

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RICHARD D. FELLOWS, :

Plaintiff, :
-against- :

COMMISSIONER OF SOCIAL SECURITY, :

Defendant. :
-----X

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

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MEMORANDUM AND ORDER

15-CV-3261 (KNF)

In this action, the plaintiff challenged, successfully, a determination by the Commissioner of Social Security (“Commissioner”) that the plaintiff was not entitled to receive disability benefits from the Social Security Administration. Before the Court is a motion by the plaintiff for an award of attorney’s fees, pursuant to 42 U.S.C. § 406(b)(1). See Docket Entry No. 29. In February 2016, the Court remanded this matter to the Commissioner for further administrative proceedings and judgment was entered at that time. Thereafter, the plaintiff sought an award of attorney’s fees under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. Subsequently, the plaintiff was awarded attorney’s fees under EAJA in the amount of \$5,400. However, owing to a pre-existing debt to the United States Government, under the Treasury Offset Program, \$1,757.63 were withheld from the \$5,400. In April 2018, the plaintiff obtained a fully favorable decision from an administrative law judge of the Social Security Administration, based upon the additional administrative proceedings that ensued after the Court remanded this matter to the Commissioner in February 2016. It is on the strength of the April 2018 administrative law judge’s determination that the plaintiff seeks an award of attorney’s fees through the instant motion.

In support of the application for attorney's fees, counsel to the plaintiff submitted an affirmation to the Court. In that document, counsel explains that he and the plaintiff entered into a retainer agreement through which counsel would be paid 25% of any past due benefits awarded to the plaintiff, should he be successful in challenging the Commissioner's previous denial of his request for benefits. Counsel to the plaintiff also explained through his affirmation that, in June 2018, he was advised that the Social Security Administration was withholding \$9,393.25 from its award to the plaintiff for past due benefits as a payment for the plaintiff's legal fees. That is the amount that the plaintiff is seeking through the instant motion. Furthermore, counsel has advised the Court that he will remit to the plaintiff \$3,642.37, "the balance of the awarded EAJA fee" should the instant motion be granted by the Court.

In contravention of Local Civil Rule 7.1(b) of this court, the defendant responded to the plaintiff's motion via a letter dated August 22, 2018. In that writing, the defendant explains that it does not oppose the fee award of \$9,393.25 to the plaintiff's counsel, pursuant to 42 U.S.C. § 406(b), as that amount "is not greater than 25% of plaintiff's past due social security disability insurance benefits and Supplemental Security Income Benefits," so long as the plaintiff's counsel refunds to the plaintiff \$3,642.37, the attorney's fee award granted pursuant to EAJA.

Attorney's fees may be awarded pursuant to both 28 U.S.C. § 2412 and 42 U.S.C. § 406. However, in such a circumstance, the Supreme Court has made clear that the attorney for a plaintiff must refund to his or her client the amount of the smaller fee. See Gisbrecht v. Barmhart, 535 U.S. 789, 796, 122 S. Ct. 1817, 1822 (2002).

Based on the motion record, the Court has determined to grant the motion appearing at Docket Entry No. 29. Accordingly, the defendant shall pay to the plaintiff's counsel \$9,393.25, and the plaintiff's counsel shall remit to the plaintiff \$3,642.37.

Dated: New York, New York
September 18, 2018

SO ORDERED:

Kevin Nathaniel Fox
KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE